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No. 03-9877

In the Supreme Court of the United States

JON B. CUTTER, ET AL., PETITIONERS

v.

REGINALD WILKINSON, DIRECTOR,
OHIO DEPARTMENT OF REHABILITATION AND
CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the institutionalized persons provision of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, is consistent with the Establishment Clause of the First Amendment.

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BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 349 F.3d 257. The opinion and order of the district court (Pet. App. B), adopting the report and recommendation of the Magistrate Judge, is reported at 221 F. Supp. 2d 827.

JURISDICTION

The court of appeals entered its judgment on November 7, 2003. The court of appeals denied the petitions for rehearing on March 3, 2004. The petition for a writ of certiorari was filed on April 19, 2004, and was granted on October 12, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in an appendix to this brief.

STATEMENT

1. a. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. 2000cc *et seq.*, is a civil rights law designed to provide, as a matter of statutory right, protection against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion in two specific contexts. Section 2 of RLUIPA applies to religious exercise in the context of land use regulation. 42 U.S.C. 2000cc. Section 3 of RLUIPA, the provision at issue in this case, protects the free exercise of religion by institutionalized persons. See 42 U.S.C. 2000cc-1. That Section provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a)(1) and (2). "[R]eligious exercise," in turn, is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). RLUIPA defines a covered "government" as "a State, county, municipality, or other governmental entity created under the authority of a State," and "any branch, department, agency, instrumentality, or official of [such] an entity." 42 U.S.C. 2000cc-5(4)(A)(i) and (ii). RLUIPA can be enforced through an action for injunctive or declaratory relief by the Attorney General, 42 U.S.C. 2000cc-2(f), and through a private right of action by any person whose exercise of religion has been substantially burdened. 42 U.S.C. 2000cc-2(a).[1]

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[1] That same statutory standard applies to all activities of the federal government, including operation of the federal prison system, pursuant to the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), this Court struck down that Act's application to state and local governments as exceeding Congress's legislative authority under Section 5 of the Fourteenth Amendment, *id.* at 529-536, but the Act continues to govern the operations of the federal government and its territories and possessions. See RLUIPA, § 7, 114 Stat. 806; *O'Bryan* v. *Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003); *Guam* v. *Guerrero*, 290 F.3d 1210, 1220-1221 (9th Cir. 2002); *Kikumura* v. *Hurley*, 242 F.3d 950, 958-960 (10th Cir. 2001); *In re Young*, 141 F.3d 854, 858-862 (8th Cir.), cert. denied, 525 U.S. 811 (1998).

b. Congress enacted RLUIPA's institutionalized persons provision in response to substantial evidence collected during three years of hearings that, in the absence of federal legislation, persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities face substantial, unwarranted, and discriminatory burdens on their religious exercise. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (*Joint Stmn.*). Congress learned, for example, that prison officials had deliberately taped confessional communications between a priest and penitent and had denied Jewish inmates access to matzo during Passover. H.R. Rep. No. 219, *supra*, at 9-10. Congress also heard testimony of sectarian discrimination in the accommodations afforded prisoners, such as permitting the lighting of votive candles but not Chanukah candles. See *Protecting Religious Liberty After* Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess., Pt. 3, at 41 (1998) (Isaac Jaroslawicz). Prison officials repeatedly refused to let Jewish prisoners miss meals on fast days or to obtain a "sack lunch" to break their fast at nightfall. *Id.* at 43. Instances of unreasoned interference with religious rituals also were identified, including cases where prison officials, (i) "without the ghost of a reason," prevented Protestant prisoners from possessing crosses, (ii) forced a

Catholic priest "to do battle over bringing a small amount of sacramental wine into prisons," and (iii) forbade a prisoner attending Episcopal services to take communion. *Joint Stmn.*, 146 Cong. Rec. at S7774-S7775, S7777.

Based on such evidence, Congress found that the religious exercise of institutionalized persons was being burdened by "frivolous or arbitrary rules," and that, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Joint Stmn.*, 146 Cong. Rec. at S7775; see also 146 Cong. Rec. E1235 (daily ed. July 14, 2000) (Rep. Canady) (RLUIPA responds to "unnecessary government interference" with religious exercise).

Concerned that federal funding not contribute in any measure to such frivolous, unreasoned, or discriminatory impositions on religious exercise, Congress invoked its Spending Clause authority, U.S. Const. Art. I, § 8, Cl. 18, to require that RLUIPA's heightened statutory protection for religious exercise be applied if a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1). A covered "program or activity" includes "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. 2000cc-5(6); see 42 U.S.C. 2000d-4a.

Congress further found that "burden[s] on religious exercise, or the removal of that burden will affect interstate commerce, particularly where the substantial burden on religion "prevents a specific economic transaction in commerce, such as * * * [the] interstate shipment of religious goods." *Joint Stmn.*, 146 Cong. Rec. at S7775. Congress determined that the "aggregate of all such transactions is obviously substantial," as "confirmed by data presented" to it during hearings on the legislation. *Ibid.* To ensure that interstate commerce not become a medium for the

imposition of unwarranted intrusions on religious liberty, Congress invoked its legislative authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, to mandate RLUIPA's application in those cases where "the substantial burden [on religion] affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-1(b)(2). RLUIPA still will not apply, however, if the defendant demonstrates that the type of burden at issue "would not lead in the aggregate to a substantial effect" on interstate commerce. 42 U.S.C. 2000cc-2(g).

2. Petitioners are inmates incarcerated in Ohio correctional facilities and adherents of Odinism, the Church of Jesus Christ Christian, and the Wiccan faith. Those religious denominations are "not traditionally recognized by the Ohio Department of Rehabilitation and Corrections." Pet. App. B5. The respondent prison officials (respondents) concede that those "are *bona fide* religions and that the [petitioners] do genuinely hold these beliefs." *Ibid.* Petitioners claim that respondents failed to accommodate their religious exercise in a variety of different ways, including retaliating and discriminating against them for exercising their non-traditional faiths, denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith. *Ibid.*; Pet. 4.

Petitioners originally filed suit under the First and Fourteenth Amendments. They later amended their complaints to include claims under RLUIPA. Pet. App. A3. Respondents moved to dismiss the RLUIPA claims on the grounds that the law violates the Establishment Clause, exceeds

Congress's legislative authority under the Spending and Commerce Clauses, and violates the Tenth and Eleventh Amendments. Pet. App. B5, B9-B18. The United States intervened in the district court, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of RLUIPA. Pet. App. A3.

The district court denied the motion to dismiss. Pet. App. B. The court noted that the respondents "have raised a facial challenge to RLUIPA's constitutionality, and have not contended that, under the facts of any of the specific cases pending before the Court, applying RLUIPA would produce unconstitutional results." *Id.* at B4. Next, having found that "Congress regularly provides grants" to the Ohio Department of Rehabilitation and Corrections (Department), Pet. App. B7, the district court held that RLUIPA is a valid exercise of Congress's Spending Clause power, *id.* at B9-B13. The court held that RLUIPA is "related to the general welfare of the United States," and it imposes a clear and "unambiguous" condition on the receipt of federal funds. *Id.* at B10, B12. Moreover, RLUIPA's "mild encouragement" of religious accommodation—federal funds constitute less than 1% of the Department's budget (*id.* at B15)—does not "turn enticement into compulsion." *Id.* at B15-B16 (citation omitted). Finally, the court held that RLUIPA's conditions are reasonably related to the purpose of the funds:

> [T]here are a myriad of direct connections between the funds made available to state prison and the restrictions imposed by RLUIPA. On the most basic level, the exercise of religion by prisoners, and the presumed rehabilitative benefits derived from that exercise, pervade the entire prison environment. Moreover, [petitioners] have identified specific programs within [the Department] which both receive federal funding and deal specifically with inmate rehabilitation.

Id. at B13 (citation omitted).

The district court also ruled that no other constitutional provisions stand as a bar to Congress's exercise of its Spending Clause power to enact RLUIPA. In particular, the court held that RLUIPA is consistent with the Establishment Clause because it applies only when religious exercise has been substantially burdened and when no countervailing prison safety and security considerations justify that burden. Pet. App. B14-B15. The court rejected the argument that RLUIPA compromises prison security, holding that no such "factual finding" could be made "on this record," and that, in fact, it remains "an open question as to the extent of the burdens (if any) RLUIPA will necessarily place on third parties such as other inmates or taxpayers." *Id.* at B15.[2]

3. The court of appeals reversed on the ground that RLUIPA violates the Establishment Clause. Pet. App. A. The court held that "RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights," *id.* at A5, and that "the primary effect of RLUIPA is not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners," *id.* at A7 The court further reasoned that RLUIPA "has the effect of encouraging prisoners to become religious in order to enjoy greater rights." *Ibid.* The court of appeals did not address any of the other constitutional challenges to RLUIPA. *Id.* at A8.

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[2] The district court did not address the respondents' Commerce Clause challenge to RLUIPA because resolution of that question would "requir[e] substantial construction of the statutory language" and would raise "serious" factual and legal "questions about the relationship between the internal operation of state prisons and interstate commerce." Pet. App. B9.

SUMMARY OF ARGUMENT

I. After years of hearings, Congress found that the free exercise of religion by institutionalized persons, including inmates, was imperiled by discriminatory accommodation practices and the unjustified and unreasoned imposition of substantial burdens on religion. Invoking its Spending and Commerce Clause authority, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to ensure the evenhanded accommodation of religion in institutions and to require careful and individualized consideration of significant burdens on religious exercise. That legislation fully comports with, and indeed advances, Establishment Clause values. This Court has repeatedly held that alleviating significant, government-imposed burdens on religious exercise does not violate the Establishment Clause and need not come packaged with equivalent benefits for secular entities. To hold otherwise would condemn numerous state constitutions and laws that provide special protection to religious exercise above and beyond what the federal Free Exercise Clause mandates. RLUIPA's comprehensive protection of all religious adherents avoids any potential for sectarian discrimination in the piecemeal accommodation of religion.

The court of appeals' holding that RLUIPA violates the Establishment Clause because it affords religion a preferential status overlooks that the First Amendment itself accords religion special protection, and it leaves room for play in the joints between what the Free Exercise Clause requires and what the Establishment Clause proscribes. The court's holding also ignores what this Court has long recognized— namely, that in tightly regulated governmental settings like prisons and the military, government may accommodate the religious needs of individuals without affording the same consideration to secular interests. RLUIPA thus does not afford religious beliefs any new

status. It simply ensures that the already widely available protections for religion are evenly extended where appropriate and that religious accommodations are made equally available to all sincerely held faiths and are administered on equal terms. Finally, the argument that the Establishment Clause regulates the federal government more forcefully than the States has been repeatedly rejected by this Court.

II. RLUIPA is a proper exercise of Congress's legislative authority. Congress's spending power authorizes it to attach conditions to the receipt of federal funds, including requirements that programs operate under standards of heightened sensitivity to federal concerns, such as eliminating discrimination on the basis of race, sex, age, disability, or religion, and eliminating unjustified burdens on religious exercise. If Ohio finds RLUIPA's standards to be too exacting, the proper recourse is to turn down the federal funds rather than to claim a right to receive them on Ohio's terms.

Although not necessary to a decision in this case, RLUIPA is also a proper exercise of Congress's Commerce Clause power. RLUIPA applies under that authority only when the particular claim at issue, in fact, portends a substantial effect on interstate commerce. RLUIPA thus ensures, on a case-by-case basis, that its application rests upon a cognizable federal interest in preventing the use of interstate commerce to facilitate unjustified or discriminatory burdens on religious exercise.

ARGUMENT

I. THE INSTITUTIONALIZED PERSONS PROVISION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment

Clause." *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987). Moreover, just last Term, the Court reaffirmed that "there is room for play in the joints between" the Free Exercise and Establishment Clauses, such that government can accommodate religion beyond what the Free Exercise Clause mandates, without violating the Establishment Clause. *Locke* v. *Davey*, 124 S. Ct. 1307, 1311 (2004) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)). The institutionalized persons provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, fully comports with the Establishment Clause because it alleviates, in a neutral and balanced manner, substantial and unwarranted government-imposed burdens on religious exercise and because it promotes religious equality.

A. RLUIPA Serves The Valid Secular Purpose Of Alleviating Significant Governmental Interference With Religious Exercise

1. *Accommodations respect, rather than endorse, religion*

"[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious [adherents] to define and carry out their religious missions." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 335 (1987). That is exactly what RLUIPA does. RLUIPA's purpose need not be "unrelated to religion" to survive Establishment Clause scrutiny, for "that would amount to a requirement that the government show a callous indifference to religious groups, * * * and the Establishment Clause has never been so interpreted." *Ibid.* (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952)).

Instead, legislative accommodations of religious exercise like RLUIPA serve a valid purpose because they "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach*, 343 U.S. at

314. Accommodating and respecting the religious character and needs of private persons does not amount to a governmental endorsement of those views or "signify an official endorsement of religious observance over disbelief." *Lee* v. *Weisman*, 505 U.S. 577, 628 (1992) (Souter, J., concurring). Rather, such accommodations reflect a healthy "respect for * * * the fundamental values of others," *ibid.*, and a sensitivity to the fact that "general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all." *Ibid.*; see also *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring in the judgment) ("[S]ince the framing of the Constitution, this Court has approved legislative accommodations for a variety of religious practices."); *id.* at 715 (O'Connor, J., concurring in part and concurring in the judgment) ("What makes accommodation permissible, even praiseworthy, is * * * that the government is accommodating a deeply held belief."). When the government lifts substantial government burdens on religion, it does not transgress Establishment Clause values, but rather it "follows the best of our traditions." *Zorach*, 343 U.S. at 314.

2. *RLUIPA ensures equality in accommodation practices*

"There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation," which is exactly how RLUIPA operates. *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and concurring in the judgment). In enacting RLUIPA, Congress did not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335. Quite the opposite, RLUIPA advances uniformly the civil rights of all religious adherents, including those "not traditionally recognized by the Ohio Department of Rehabilita-

tion and Corrections." Pet. App. B5. Congress played no favorites, and indeed adopted a comprehensive approach that ensures that all faiths will receive accommodations on equal terms.[3]

The court of appeals' observation (Pet. App. A5) that RLUIPA operates more broadly than the traditional, case-by-case approach to accommodations is true—but that is a constitutional asset. That comprehensive protection ensures that governmental accommodations are equally available to all adherents. By contrast, the process of piecemeal accommodations can generate concern that government officials "may fail to exercise governmental authority in a religiously neutral way" and provides no assurance at the outset "that the next similarly situated group seeking [an accommodation] of its own will receive one." *Kiryas Joel*, 512 U.S. at 703 (citation omitted). RLUIPA thus provides the kind of up-front assurance of neutrality that is generally lacking even in permissible accommodations of religion.

The problem of selective accommodations in the prison context, where the very nature of prison life requires some accommodation to enable most religious exercises, is a real one. See Pet. App. B5 (although the sincerity and bona fides of petitioners' faiths are conceded, those faiths are "not traditionally recognized by the Ohio Department of Rehabilitation and Corrections"); J.A. 280 (Ohio prison official's statement that "I truly regret that the House of Yahweh is not a mainstream religion because that would help us come to a more agreeable resolution of some of your requests."); *Madison* v. *Riter*, 355 F.3d 310, 313 (4th Cir. 2003) (plaintiff denied the same kosher diet offered to other prisoners),

[3] Cf. *Kiryas Joel*, 512 U.S. at 706 (New York law "singles out a particular religious sect for special treatment"); *id.* at 715 (O'Connor, J., concurring in part and concurring in the judgment) (accommodations may "justify treating those who share this [religious] belief differently from those who do not; but they do not justify discriminations based on sect").

petition for cert. pending, No. 03-1404 (filed Apr. 6, 2004); *Charles* v. *Verhagen*, 348 F.3d 601, 605 (7th Cir. 2003) (Muslim inmate denied Islamic prayer oil even "though other kinds of fragrant body oils and lotions were made available to inmates").

The need for evenhanded accommodation of religious exercise is at its apex in the context of institutionalized persons, whom the government has deprived of the resources, freedom, and physical capacity independently to meet their own religious needs. That is why in prisons and state mental hospitals, as in the military, the Establishment Clause has long been understood to permit government to do what it generally cannot do elsewhere: provide chaplains, conduct worship services and religious instruction, undertake sacramental practices, provide spiritual counsel, and distribute religious literature.[4]

The need for a comprehensive and non-discriminatory accommodation mandate is particularly acute in such closed and highly regulated environments because a failure to accommodate in that setting has much more drastic and far-reaching repercussions than in society at large. The denial does more than simply leave the religious adherent alone; the adherent actually may be rendered helpless and physically incapable of exercising his faith. The failure to accommodate minority or non-traditional faiths literally can be the death knell for those belief systems within the restrictive regulatory confines of institutional living. See *Zorach*, 343 U.S. at 314 (government may not "throw its weight against efforts to widen the effective scope of religious influence").

[4] See, *e.g.*, *Kiryas Joel*, 512 U.S. at 705-706; *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 226 n.20 (1963); *id.* at 296-297, 299 (Brennan, J., concurring); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 352 (1987); *Benning* v. *Georgia*, No. 04-10979, 2004 WL 2749172, at *12 (11th Cir. Dec. 2, 2004); *Rudd* v. *Ray*, 248 N.W.2d 125, 128-129 (Iowa 1976).

For example, while students denied "release time" have ample alternative opportunities to receive religious instruction, an inmate denied a parallel accommodation may effectively be denied the opportunity to exercise his faith at all.[5]

3. *The power to accommodate is broader than the Free Exercise Clause's mandate*

The court of appeals attempted to distinguish *Amos* (Pet. App. A5) on the ground that the accommodation in "*Amos* arguably was necessary to avoid a violation of the Establishment Clause." But this Court has repeatedly recognized that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. Indeed, "[t]o equate the two would be to deny a national heritage with roots in the Revolution itself." *Ibid.*; see *Locke*, 124 S. Ct. at 1311 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."). Moreover, there is a particularly wide scope for "play in the joints" in the prison context, where the realities of prison life allow for both accommodations and restrictions of religious exercise that would be unconstitutional outside prison walls.

B. RLUIPA Has The Permissible Effect Of Preventing Religious Discrimination And Unjustified Burdens On Religious Exercise

The court of appeals held (Pet. App. A5) that RLUIPA impermissibly affords "greater protection to religious rights than to other constitutionally protected rights." RLUIPA

[5] See *Joint Stmn.*, 146 Cong. Rec. at S7775 ("Institutional residents' right to practice their faith is at the mercy of those running the institution."); 146 Cong. Rec. E1234, E1235 (July 14, 2000) (Rep. Canady) ("The legislation * * * protect[s] the religious exercise of a class of people particularly vulnerable to government regulation—institutionalized persons.").

certainly does afford heightened protection for religious exercise, but there is nothing constitutionally problematic about that.

1. *Government may accommodate religion alone*

The court of appeals' rationale would condemn countless accommodation laws, including (i) the early-release program in *Zorach*, *supra*, which released students to attend religious classes but not to attend political rallies or to engage in other constitutionally protected activities; (ii) tax exemptions for religious property like those upheld in *Walz*, 397 U.S. at 674 (upholding exemption regardless of whether churches share the social welfare character of other exempt entities); (iii) the religious accommodation mandate in Title VII, 42 U.S.C. 2000e-2(a), which requires some accommodation of employees' religious needs, but not other constitutionally protected interests; (iv) 10 U.S.C. 774, a law that, in response to *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), increases protection for religious, but not secular, objections to military uniform restrictions; (v) the sacramental wine exemption from Prohibition, National Prohibition Act, ch. 85, § 3, 41 Stat. 308; and (vi) every state constitution and law that, like RLUIPA, selectively imposes heightened protection for the exercise of religion over and above the federal constitutional floor set in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990).[6]

[6] See Ala. Const. Amend. 622, § V(b) (1999); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-281 (Alaska), cert. denied, 513 U.S. 979 (1994); Ariz. Rev. Stat. Ann. § 41-1493.01(C) (West 2004); Conn. Gen. Stat. Ann. § 52-571b(b) (West 1999); Fla. Stat. Ann. § 761.03(1) (West 1997); Idaho Code § 73-402(3) (2004); 775 Ill. Comp. Stat. 35/15 (West 1999); *State* v. *Evans*, 796 P.2d 178, 179-180 (Kan. Ct. App. 1990) (applying compelling interest test without discussing *Smith*); *Rupert* v. *City of Portland*, 605 A.2d 63, 65-66 (Me. 1992); *Attorney General* v. *Desilets*, 636 N.E.2d 233, 235-236 (Mass. 1994); *Porth* v. *Roman Catholic Diocese*, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995); *State* v. *Hershberger*, 462 N.W.2d

The Establishment Clause does not condemn those widespread and commonsense accommodations of religion for two reasons. First, the Constitution allows religion to be differentially accommodated because religion is different under our constitutional design and history. As evidenced by the dual protections for religion in the First Amendment, the Constitution itself is not neutral on the subject of religion. Indeed, the Constitution contains an accommodation of its own in Article VI, Clause 3, by allowing support for the Constitution to be evidenced by oath or affirmation. *Kiryas Joel*, 512 U.S. at 714 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 744 (Scalia, J., dissenting) see also U.S. Const. Art. I, § 7, Art. VII (excepting Sundays from the ten-day period for exercise of the presidential veto). Moreover, while the Free Speech Clause gives substantial protection to non-religious speech, the Free Exercise Clause gives unique protection to religious conduct, and religious conduct alone.

That special protection for religion reflects the reality that "religion has been closely identified with our history and government," *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203,

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393, 396-398 (Minn. 1990); *In re Brown*, 478 So. 2d 1033, 1039 & n.5 (Miss. 1985); *St. John's Lutheran Church* v. *State Comp. Ins. Fund*, 830 P.2d 1271, 1276 (Mont. 1992) (applying compelling interest test without discussing *Smith*); *In re Browning*, 476 S.E.2d 465 (N.C. 1996) (same); N.M. Stat. Ann. § 28-22-3 (1978); *Rourke* v. *New York State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), aff'd, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *Humphrey* v. *Lane*, 728 N.E.2d 1039, 1043 (Ohio), cert. denied, 531 U.S. 912 (2000); Okla. Stat. Ann. title 51, § 253(B) (West 2000); 71 Pa. Cons. Stat. Ann 2401 *et seq.*; R.I. Gen. Laws § 42-80.1-3(b) (Lexis 1998); S.C. Code Ann. § 1-32-40 (Law Co-op 1976); Tex. Civ. Prac. & Rem. Code Ann. § 110.003(b) (West 2004); *Hunt* v. *Hunt*, 648 A.2d 843, 853 (Vt. 1994); *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 185-187 (Wash. 1992); *State* v. *Miller*, 549 N.W.2d 235, 241 (Wis. 1996); cf. *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) (state constitutional protection of religion is "substantially stronger" than federal protection), cert. denied, 424 U.S. 954 (1976).

212 (1963), and, as this Court has "asserted pointedly" on five different occasions, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Lynch* v. *Donnelly*, 465 U.S. 668, 675 (1984); *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *Walz*, 397 U.S. at 672; *Schempp*, 374 U.S. at 213; *Zorach*, 343 U.S. at 313. Accordingly, "[n]either government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). The Establishment Clause was enacted to protect individuals' ability to exercise their religion free from governmental direction or imposition, not to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens," *County of Allegheny* v. *ACLU*, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring), or to compel official disregard of or stilted indifference to the vital and uniquely defining role that religion can play in people's lives.

Accordingly, this Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid." *Amos*, 483 U.S. at 338. Substantial burdens on religion may be selectively relieved because their impact on the individual is qualitatively different. In addition to suffering the same secular burden as others, the religious adherent also suffers a separate and distinct encroachment on his conscience, spirit, and moral foundation. It "is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with our happy tradition of avoiding unnecessary clashes with the dictates of conscience." *Gillette* v. *United States*, 401 U.S. 437, 453 (1971). To hold otherwise—to insist that the Constitution requires prison officials to equate an inmate's request for sacramental communion wine with another prisoner's secular request for a beer—would be at war with our constitutional tradition.

Second, a religious accommodation does not result in the government advancing religion; it simply affords individuals the opportunity to exercise and advance their religious faith on their own. A law is not unconstitutional simply because it allows religious adherents "to advance religion, which is their very purpose. For a law to have forbidden 'effects' * * *, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Thus, exemptions from generally applicable prison regulations—whether pursuant to RLUIPA or to independent state policies—do not constitute impermissible governmental facilitation of religion, because the government itself neither adds to nor subsidizes propagation of the religious message. *Ibid.* RLUIPA simply affords a comprehensive mechanism to ensure that institutionalized persons have an opportunity to exercise their self-chosen faiths unburdened by unwarranted governmental limits.

For those two reasons, the Establishment Clause does not generally require that accommodations of religion "come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338; see *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment) ("Accommodations may thus justify treating those who share this belief differently from those who do not."). The military may permit soldiers to wear religious headgear, such as a yarmulke, without equally tolerating baseball caps with political slogans or team insignia. Likewise, the government can exempt established religious groups that provide their own mechanisms for supporting elderly members from the Social Security system, 26 U.S.C. 1402(g)(1), without equally exempting tax protesters. And prisons can, and routinely do, meet the dietary needs of religious adherents without similarly accommodating other prisoners' secular food preferences.

2. RLUIPA balances the interests of the religious adherent and third parties

The government's capacity to accommodate religion is not unlimited. Congress may act only "to alleviate significant *governmental* interference" with religious autonomy and exercise. *Amos*, 483 U.S. at 335 (emphasis added). RLUIPA meets that test. RLUIPA's protections apply only when governmental conduct—not private conduct—imposes a "substantial burden" on religious exercise, 42 U.S.C. 2000cc-1(a). Congress thus limited RLUIPA's application to circumstances where the conflict between private conscience and governmental action is acute and where the impact of the law on religious adherents is distinctly intrusive. See *Lee*, 505 U.S. at 629 (Souter, J., concurring); contrast *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.) (waiver of sales tax for religious publications unconstitutional where the tax posed no distinctive burden on religious exercise); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985) (broad statutory mandate to relieve Sabbatarians of even minor burdens imposed by private employers violates the Establishment Clause).

In addition, RLUIPA avoids any impermissible sectarian discrimination in accommodations. In that regard, RLUIPA's coverage for all bona fide religious faiths parallels the Equal Access Act's broad accommodation of religious clubs, see 20 U.S.C. 4071 *et seq.*, which was upheld in *Board of Educ.* v. *Mergens*, 496 U.S. 226 (1990), and that up-front assurance of neutrality stands in sharp contrast to the sect-specific accommodations struck down in *Caldor*, *supra*, and *Kiryas Joel*, *supra*.

Finally, RLUIPA does not impose an absolute command of accommodation, regardless of the cost to the government or third parties. Compare *Caldor*, 472 U.S. at 709-710. The compelling interest test factors the countervailing interests of the government and any burden on third parties into the

accommodation calculus. With respect to prisons in particular, Congress contemplated that RLUIPA's balancing test would afford "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with considerations of costs and limited resources." *Joint Stmn.*, 146 Cong. Rec. at S7775 (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)).[7]

3. *Evenhanded religious accommodation is particularly important in the prison context*

In the court of appeals' view (Pet. App. A6-A7), the prison context constricts Congress's ability to accommodate religion because all fundamental rights are curtailed in prison. That gets it exactly backwards. Courts have long recognized that government's authoritative and comprehensive control over prisoners affords it greater latitude in meeting the religious needs of inmates. *Kiryas Joel*, 512 U.S. at 706 ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion."); see note 4, *supra*. Indeed, long before RLUIPA or the Religious Freedom Restoration Act, Ohio provided chaplains, permitted assemblies for worship services, allowed the possession of religious materials, and otherwise accommodated inmates' religious exercise.[8] Thus

[7] See also *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2338 (2003) (in applying strict scrutiny, "[c]ontext matters"); *Murphy* v. *Missouri Dep't of Corrs.*, 372 F.3d 979, 987-988 (8th Cir.), cert. denied, 125 S. Ct. 501 (2004).

[8] See, *e.g.*, *Pollock* v. *Marshall*, 845 F.2d 656, 657 (6th Cir.), cert. deneid, 488 U.S. 897 (1988); *Abdullah* v. *Kinnison*, 769 F.2d 345, 347 (6th Cir. 1985); *Gawloski* v. *Dallman*, 803 F. Supp. 103, 113 (S.D. Ohio 1992); *Taylor* v. *Perini*, 413 F. Supp. 189, 238 (N.D. Ohio 1976); Ohio Admin. Code § 5120-9-25 (Anderson 1979). The federal Bureau of Prisons has had a chaplaincy program since 1930.

Ohio's inmates (like inmates around the Nation), as a matter of state law, already enjoy "rights superior to those of non-religious prisoners" (*id.* at A7).

RLUIPA thus must be evaluated in light of the special need for accommodation in the prison context and the corresponding reality that the religious needs of many faiths—or at least those "traditionally recognized" by respondents (*id.* at B5)—have long been accommodated behind prison walls. Whatever advantage such accommodations may afford religious adherents as a class, our constitutional tradition has long tolerated it. See *Lynch*, 465 U.S. at 683 ("[O]ur precedents plainly contemplate that on occasion some advancement of religion will result from governmental action."). And the respondents have offered no evidence, despite decades of experience, that those quite significant religious accommodations have unconstitutionally encouraged prisoners "to become religious" (Pet. App. A7). If those substantive accommodations do not transgress constitutional bounds, then neither does RLUIPA. RLUIPA, after all, does not mandate that any particular accommodation be made; RLUIPA simply provides a legal framework that ensures the evenhanded consideration, on equal terms, of all faith-based requests for accommodation.[9]

[9] While the court of appeals correctly noted (Pet. App. A7) that religious accommodations might have particular appeal in the otherwise spartan and highly regulated lives of prisoners, that consideration does not transform every accommodation into unconstitutional coercion. In the heavily regulated and controlled routines of schoolchildren, few things are more highly valued than the opportunity to be released from school custody early. Yet that did not render the school-release program in *Zorach* an unconstitutional enticement to religious conversion. Likewise, members of the military have little control over countless aspects of their daily lives. But that does not make the accommodation of otherwise strict uniform rules to religious needs, 10 U.S.C. 774, an unconstitutional religious incentive.

The court of appeals nevertheless found RLUIPA invalid because (Pet. App. A6) religious rights are not "at greater risk of deprivation in the prison system than other fundamental rights." That is a highly debatable proposition, and a legally irrelevant one in any event. Certainly, the court of appeals' unsubstantiated surmise is an insufficient basis for impugning the legislative judgments of Congress, as well as a number of States, see note 6, *supra*, that have passed laws designed to protect religious exercise in prisons. Furthermore, the Court has emphasized that religion may be accommodated, consistent with the Establishment Clause, even in the absence of any threatened deprivation of Free Exercise rights. It follows, *a fortiori*, that lawful accommodation does not require a predicate showing of a disproportionate risk of deprivation. When the government relaxes its regulations to allow for unencumbered religious exercise, it promotes constitutional values. It does not engage in some constitutionally suspect conduct that requires heightened justification. And even if the free exercise of religion faces no greater risk of deprivation, Congress and the States could reasonably conclude that, given the unique role that religion plays in the lives of its adherents, the consequences of such deprivations take a relatively higher toll on the emotional well-being, development, personal identity, psychological growth, and rehabilitation of inmates.

In the final analysis, the court of appeals' rationale is just a variation of the long-rejected argument that accommodations of religion must come packaged with equivalent benefits for secular interests. Even were that a proper consideration, the court of appeals' argument overlooks that RLUIPA is only one of a long list of federal laws protecting the constitutional and statutory rights of prison inmates. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 656-657 (2002) (Establishment Clause inquiry must consider all relevant programs, not just the specific program challenged).[10] Set in context, then, RLUIPA is simply one component of an overarching federal legislative program that seeks to promote the "perfect equality of civil rights and the equal protection of the laws" in prisons receiving federal money. *Ex parte Virginia*, 100 U.S. 339, 345-346 (1879). Finally, while the respondents have argued that RLUIPA imposes inordinate burdens on prisons and other inmates, the district court specifically found the record insufficient to sustain that charge either facially or as applied to petitioners' claimed religious accommodations. Pet. App. B15.

The respondents' concern (Br. 12-13) that RLUIPA opens the floodgates to inmate litigation also has not been borne out by experience. The number of civil rights lawsuits filed by inmates in federal court in the years following RLUIPA's enactment has remained essentially static, and the number of lawsuits filed in state courts has declined. See http://www.uscourts.gov/judbus2003/appendices/c2a.pdf; see also 139 Cong. Rec. S14,464 (daily ed. Oct. 27, 1993) (Sen. Coats) (prior to *Smith*, "[p]risoner religious exercise suits

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[10] See, *e.g.*, 42 U.S.C. 1997a(a), 1997c(a)(1) (Attorney General may file suit to address "egregious or flagrant conditions" in state prisons); 42 U.S.C. 3769b(a)(1) and (6) (federal assistance for correctional facilities requires States to develop a "plan for reducing overcrowding and improving conditions of confinement" and to provide "reasonable assurance that the applicant will comply with [federal] standards and recommendations"); 18 U.S.C. 4013(a)(4) (federal funds available for construction, physical renovation, acquisition of equipment, supplies, or materials required to establish acceptable conditions of confinement and detention services in any State or local jurisdiction which agrees to provide guaranteed bed space for Federal detainees"); 42 U.S.C. 2000d (prohibiting discrimination on the basis of "race, color, or national origin"); 20 U.S.C. 1681(a) (barring discrimination on the basis of sex in any "education program or activity receiving Federal financial assistance"); 29 U.S.C. 794(a) (prohibiting discrimination on the basis of disability"); 42 U.S.C. 6102 (prohibiting discrimination on the basis of age in "any program or activity receiving Federal financial assistance"); 42 U.S.C. 12132 (prohibiting discrimination on the basis of disability in state and local prisons).

were less than 1 percent of all prisoner civil rights cases in Ohio when [a] higher standard of review was in force"). Furthermore, in the federal government's experience, statutory claims are almost invariably joined with First Amendment and other claims, so that the case would have to be litigated anyway. See 139 Cong. Rec. S14,363 (Oct. 26, 1993) (daily ed. Sen. Hatch) (an increase in prisoner filings followed the issuance of the *Smith* decision). The unfortunate reality is that "prisoners are going to institute a large number of lawsuits regardless of the standard of review applicable to prison lawsuits * * * [b]ecause prisoners do not have many other things to do." *Ibid.* The more effective way to combat abusive prisoner litigation is not to withhold substantive civil rights protections, but to impose procedural requirements that inhibit meritless filings, which Congress has already done. See Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e; see generally Bureau of Justice Statistics, *Prisoner Petitions Filed in U.S. District Court, 2000, with Trends 1980-2000*, at 4-7 (Feb. 2002) (notable decrease in prisoner filings following enactment of the Prison Litigation Reform Act).

The respondents' operational objections to RLUIPA founder in the face of the practical experience of the federal Bureau of Prisons and other States. For more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA, see 42 U.S.C. 2000bb-1, without compromising prison security, public safety, or the constitutional rights of other prisoners.[11] In

[11] In enacting RLUIPA, Congress was aware of the federal Bureau of Prisons' largely favorable experience applying the Religious Freedom Restoration Act in the prison context. See *Joint Stmn.*, 146 Cong. Rec. at S7776 (letter from the Dep't of Justice) ("[W]e do not believe [RLUIPA] would have an unreasonable impact on prison operations. RFRA has been in effect in the Federal prison system for six years and compliance with that statute has not been an unreasonable burden to the Federal prison system.").

addition, a number of States have afforded heightened scrutiny to prisoners' free exercise claims for years without constitutional incident.[12] Indeed, it is difficult to understand how requiring prison officials to allow a Jewish inmate to eat the same kosher meal already served to other inmates, see *Madison*, *supra*, or to allow a Muslim inmate to possess prayer oil on the same terms that other inmates possess oil and body lotions, see *Charles*, *supra*, would trench upon the interests of any other inmates or otherwise run afoul of constitutional limits. On the other hand, if a particular accommodation requested under RLUIPA would inordinately burden other inmates, then the prison's interest in avoiding an unconstitutional accommodation of religion will

[12] See *Outlaw* v. *Warden*, No. CV000802033, 2001 WL 418561, at *1 (Conn. Super. Ct. Mar. 30, 2001); *Roles* v. *Townsend*, 64 P.3d 338, 339 (Idaho Ct. App.), cert. denied, 540 U.S. 839 (2003); *Diggs* v. *Snyder*, 775 N.E.2d 40, 44, 45 (Ill. App. Ct.), appeal denied, 787 N.E.2d 156 (2002); *Steele* v. *Guilfoyle*, 76 P.3d 99, 101-102 (Okla. Ct. App. 2003); S.C. Code Ann. §§ 1-32-45, 24-27-500; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.006(f)–(g); cf. *Evans*, 796 P.2d at 179-180 (probation). The plain text of a number of other state laws appears to extend heightened scrutiny to prisons, but courts have not yet specifically confirmed the law's application in that context. See Ala. Const. Amend. 622, §§ II(5), IV(3) (1999); Ariz. Rev. Stat. Ann. §§ 41-1493(3)–(4) (West 2004); Fla. Stat. Ann. § 761.02(1) (West 1997); N.M. Stat. Ann. § 28-22-2(B) (1978); R.I. Gen. Laws § 42-80.1-2 (1998). Congress also brought to bear the information it learned during the enactment of the Religious Freedom Restoration Act, where the question of the law's applicability to prisons was the subject of specific and extensive debate. See 139 Cong. Rec. at S14,350-S14,368 (daily ed. Oct. 26, 1993); *id.* at S14,461-S14,471 (daily ed. Oct. 27, 1993); H.R. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993); S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993). There, 13 State Attorneys General recommended that the compelling interest test should be applied to the prison context because that test "strikes a proper balance" between the needs of religious claimants and governmental regulation. 139 Cong. Rec. at S14,351-S14,352.

constitute a compelling interest within the meaning of RLUIPA.

C. The Establishment Clause Applies Equally To The Federal And State Governments

In their brief at the certiorari stage (at 11), the respondents referenced, for the first time in this litigation, the argument that the Establishment Clause imposes unique disabilities on the federal government, such that RLUIPA would be constitutional if enacted by a State but is unconstitutional when enacted by the federal government. That late-breaking argument (perhaps inspired by the recognition that the logic of the opinion below renders constitutionally suspect all of Ohio's own longstanding and commonsense accommodations of religion in prison) is meritless.

1. *Stare decisis forecloses the argument*

It is too late in the day to argue that the federal Constitution contains two different Establishment Clauses with varying levels of potency. "This Court has confirmed and endorsed th[e] elementary proposition of law time and time again" that the Fourteenth Amendment "impose[s] the same substantive limitations on the States' power to legislate that the First Amendment ha[s] always imposed on the Congress' power." *Wallace* v. *Jaffree*, 472 U.S. 38, 49 (1985).[13] Indeed,

[13] See *Schempp*, 374 U.S. at 215 ("[T]his Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made *wholly applicable* to the States by the Fourteenth Amendment.") (emphasis added); *id.* at 216 ("In a series of cases * * * the Court has repeatedly reaffirmed that doctrine, and we do so now.") (citing additional cases); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally * * * pass laws or impose requirements which aid all religions as against non-believers."); *Everson* v. *Board of Educ. of Ewing Township*, 330 U.S. 1, 15 (1947) ("There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause."); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) ("The Fourteenth Amendment has rendered the legislatures of the states *as incompetent as Congress* to enact such laws [respecting an establishment of religion].") (emphasis added); see generally *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969) ("In an increasing number of cases, the Court has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.") (quoting *Malloy* v. *Hogan*, 378 U.S. 1 (1964)).

if the Establishment Clause applied differentially to federal laws that encourage or require States to accommodate religion, one would have expected some reference to that fact in the prior opinions of the Court rejecting Establishment Clause challenges to such federal legislation.[14] But not one of those cases suggested that the federal law was peculiarly vulnerable to invalidation, even though each law operated in the precise area that respondents claim is the exclusive domain of the States: the provision of benefits to religious groups or individuals within the "play in the joints" between what the Free Exercise Clause requires and the Establishment Clause forbids. *Locke*, 124 S. Ct. at 1311.

Moreover, in *Wallace*, this Court rebuffed an argument similar to the respondents'. In that case, the district court ruled that the Establishment Clause does not apply to the States based on an analysis of constitutional history similar to respondents'. *Jaffree* v. *Board of Sch. Comm'rs*, 554 F. Supp. 1104, 1113-1126, 1128 (S.D. Ala.), rev'd in part, 705 F.2d 1526 (11th Cir. 1983), aff'd, 472 U.S. 38 (1985). Alabama's brief defending that judgment in this Court argued that the incorporated Establishment Clause should not proscribe the State's accommodation of school students' prayers. Pet. Br. at 37-43, *Wallace* v. *Jaffree*, *supra* (No. 83-812). This Court's decision in *Wallace* resoundingly rejected

[14] See *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality); *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Mergens*, *supra*; *Bowen* v. *Kendrick*, 487 U.S. 589 (1988); *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

the district court's "remarkable conclusion," 472 U.S. at 48, and reaffirmed as "firmly embedded in our constitutional jurisprudence" the "proposition that the several States have *no greater power* to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States," *ibid.* (emphasis added).[15] Ohio's partial incorporation theory should fare no better.

2. *RLUIPA leaves States free to make accommodation choices*

The respondents object (Resp. Cert. Br. 10-11) that RLUIPA exceeds the limits historically imposed by the Establishment Clause on the federal government because it entails the federal government lifting burdens imposed on religion by the States and thus interferes with "the States' authority to make policy choices in the 'play in the joints' between what the Establishment Clause prohibits and what the Free Exercise Clause requires."

That argument misunderstands how RLUIPA operates. In the vast majority of its applications to institutionalized persons and all of its applications to States, RLUIPA simply provides States with a choice.[16] If they choose to accept

[15] See also *Lee*, 505 U.S. at 620 n.4 (Souter, J., concurring) (the Court "unanimously incorporated the Establishment Clause into the Due Process Clause of the Fourteenth Amendment and, by so doing, extended its reach to the actions of States," and "not one Member of this Court has proposed disincorporating the Clause") (citation omitted); *id.* at 624 n.5 (were petitioners "arguing that the Establishment Clause is exclusively a structural provision mediating the respective powers of the State and National Governments," that "position would entail the argument, * * * which we would almost certainly reject, that incorporation of the Establishment Clause under the Fourteenth Amendment was erroneous").

[16] Every application of RLUIPA to the States is justified as Spending Clause legislation, because every state prison receives federal funding. See *FY 2003 Office of Justice Programs & Office of Community Oriented Policing Services Grants by State* (visited Dec. 15, 2004) <http:// www.ojp.usdoj.gov/fy2003grants>.

federal funds, they must agree to exercise their own authority in a way that avoids unwarranted burdens on religion. RLUIPA thus protects the *federal* interest in ensuring that *federal* funds do not contribute to unjustified burdens on religion, and preemptively prevents the federal government from contributing to the imposition of significant and unwarranted burdens on religion. At the same time, RLUIPA reflects Congress's "refus[al] to fund" activities that impose unjustified burdens on religious exercise "out of the public fisc." *Rust* v. *Sullivan*, 500 U.S. 173, 198 (1991). When States agree to accept federal funds subject to an agreement to lift their own burdens on religious exercise in a manner consistent with the Establishment Clause, there is no greater intrusion on state sovereignty than when a State agrees to alter its polices on race, gender, disability, age, or a host of other subjects with an eye to obtaining federal funds. Nor does an accommodation that a State could make on its own under the Establishment Clause somehow become constitutionally problematic just because the State's underlying motivation is less to "follow the best of our traditions," *Zorach*, 343 U.S. at 314, than to obtain federal funds.

The respondents' protestations about the States' historic autonomy to make accommodation decisions concerning their own resources in their own programs are beside the point. RLUIPA applies to this case because Ohio voluntarily chose to shed that autonomy and to integrate state and federal resources in prison management. The federal government has not unilaterally intruded into the State's operations. Ohio invited the federal government's partnership when it chose to accept federal funding for its prisons. See *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923).

Nor is it relevant that RLUIPA would impose obligations on hypothetical States that declined federal funds in those cases where the substantial burden implicated commerce. That concern is hypothetical because every State accepts federal funds. But, in any event, respondents cannot take a flawed Establishment Clause argument and a flawed Tenth Amendment argument and transform them into a valid Establishment Clause/Tenth Amendment argument. Government action that accommodates religious exercise by eliminating government burdens does not violate the Establishment Clause, and the States' traditional authority to decide the extent of their accommodation of religion is no different from countless other vital tasks of state government that give way to validly enacted federal legislation when those activities implicate interstate commerce.[17]

3. *The Establishment Clause protects religious liberty against both state and federal intrusion*

The respondents' argument that the First Amendment contains two different Establishment Clauses—one for the federal government and one for the States—misreads history. The starting point for that argument is the proposition that the Establishment Clause's central purpose in 1791 was to prevent federal interference with the established

[17] Beyond that, the problem in *Caldor* was not that the law pertained to burdens imposed by third parties. For that is precisely what Title VII's religious accommodation mandate does, 42 U.S.C. 2000e-2(a), which Congress enacted "to assure the individual additional opportunity to observe religious practices." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 70 (1986). Just as Congress may pass laws protecting federal funds, Congress may ensure that interstate commerce does not become a mechanism for unjustified or discriminatory burdens on religious exercise. See *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); see also *Caldor*, 472 U.S. at 712 (O'Connor, J., concurring) (requiring reasonable accommodation of religious practitioners is a proper component of an anti-discrimination law).

churches of the States. See Pet. at 12-13, *Bass* v. *Madison*, petition for cert. pending, No. 03-1404 (filed Apr. 6, 2004) (adopted at Resp. Cert. Br. 10-11). That no doubt was part of the Establishment Clause's genesis. See *Lee*, 505 U.S. at 641 (Scalia, J., dissenting). But the suggested corollary of the argument—that the Establishment Clause continues uniquely to disable the federal government from acting —does not follow.

a. First, the argument about the Clause's original federalist purpose proves too much. The entire Bill of Rights was designed as a constraint on the power of the federal government and the federal government alone. See, *e.g.*, *Adamson* v. *California*, 332 U.S. 46, 51 (1947), overruled in part on other grounds by *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Barron* v. *Mayor & City Council*, 32 U.S. (7 Pet.) 243, 247 (1833) (the entire Bill of Rights has no application to the States). By underscoring what the federal government could not do, the Bill of Rights highlighted what the States could do.

Accordingly, the "whole power over the subject of religion"—not just the establishment of religion—"[was] left exclusively to the state governments." Joseph Story, *Commentaries on the Constitution of the United States* § 1873 (1833); see *Permoli* v. *Municipality No. 1*, 44 U.S. (3 How.) 589, 609 (1845) (Free Exercise Clause inapplicable to States). Numerous States restricted the free exercise of religion in ways that the federal government could not. Several state constitutions, for example, specifically proscribed acts of worship that might disturb others or the peace and safety of the government.[18] The position of the respondents thus

[18] Ala. Const. art. I, § 5 (1819); Ala. Const. art. I, § 3 (1865); Cal. Const. art. I, § 4 (1849); Conn. Const. art. I, § 3 (1818); Ga. Const. art. LVI (1777); Me. Const., art. I, § 3 (1819); Md. Const., *Declaration of Rights*, art. 33 (1776); Md. Const., *Declaration of Rights*, art. 33 (1851); Md. Const., *Declaration of Rights*, art. 36 (1864); Md. Const., *Declaration of Rights*,

would compel the conclusion that the Free Exercise Clause likewise operates with reduced force on the States.

Indeed, the logic of respondents' position would lead to a sort of junior-varsity disincorporation of the entire Bill of Rights. For example, Thomas Jefferson was of the view that the First Amendment's protection for the press "reflected a limitation upon Federal power, leaving the right to enforce restrictions on speech to the States." *Dennis* v. *United States*, 341 U.S. 494, 522 (1951) (Frankfurter, J., concurring); see also *id.* at 522 n.4; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276-277 (1964) (same). Accordingly, early state laws permitted convictions for political libel and speech deemed to be abusive. *Dennis*, 341 U.S. at 521 (citing state laws from Massachusetts, Pennsylvania, Delaware, and Virginia). The Establishment Clause thus was not the singularly unique disability on the federal government that the respondents' argument posits, and no fair reading of history could limit their partial disincorporation theory to the Establishment Clause.

b. Second, focus on the original purpose of the Establishment Clause proves too little, because everything changed with the Fourteenth Amendment. By the time of the Fourteenth Amendment's enactment, established state churches were a distant memory,[19] and so the Establishment Clause as incorporated through the Fourteenth Amendment has been understood as a quintessential protection for

art. 36 (1867); Mass. Const. pt. I, art. II (1780); Minn. Const. art. I, § 16 (1857); Miss. Const. art. I, § 3 (1817); Miss. Const. art. XIII, § 4 (1832); Mo. Const. art. I, § 9 (1865); Nev. Const. art. I, § 4 (1864); N.H. Const. art. I, § V (1784); N.Y. Const. art. VII, § 3 (1821); N.Y. Const. art. I, § 3 (1846); S.C. Const. art. VIII, § 1 (1790); S.C. Const. art. IX, § 8 (1865).

[19] See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1437 (1990); Sanford H. Cobb, *The Rise of Religious Liberty in America* 513-517 (1902).

individual religious liberty and freedom of conscience.[20] The need to ensure individual protection against laws respecting an establishment of religion thus stood, at the time of the Fourteenth Amendment and certainly at the time of this

[20] See, *e.g.*, *Lee*, 505 U.S. at 609 (Blackmun, J., concurring) ("We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause."); *Engel* v. *Vitale*, 370 U.S. 421, 429, 432 (1962) (Establishment Clause reflects the Founders' view that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services," and the Fourteenth Amendment "reinforced" that principal because "governmentally established religions and religious persecutions go hand in hand"); *McGowan* v. *Maryland*, 366 U.S. 420, 460-461 (1961) (opinion of Frankfurter, J.) ("The general principles of church-state separation were found to be included in the [Fourteenth] Amendment's Due Process Clause in view of the meaning which the presuppositions of our society infuse into the concept of 'liberty' protected by the clause. This is the source of the limitations imposed upon the States."); *Everson*, 330 U.S. at 15 (noting that the Establishment and Free Exercise Clauses are "complementary" in protecting "religious freedom," such that the Fourteenth Amendment carries forward "the same application and broad interpretation" of the Establishment Clause); *ibid.* ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority."); *Cantwell*, 310 U.S. at 303 (the "fundamental concept of liberty embodied in" the Fourteenth Amendment "embraces the liberties guaranteed by the First Amendment"); *Davis* v. *Beason*, 133 U.S. 333, 342 (1890) (the First Amendment "was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relation to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper").

Court's incorporation decisions, on an equal footing with the other provisions of the Bill of Rights as a vital guarantor of individual liberty that is indispensable to "a free democratic government," *Lee*, 505 U.S. at 609 (Blackmun, J., concurring).

Moreover, it is clear that cementing Congress's power to protect and enforce the free exercise of religion against State intrusion was a matter of specific concern at the time the Fourteenth Amendment was enacted. Slavery's "incessant, unrelenting, aggressive warfare upon * * * the purity of religion," Cong. Globe, 38th Cong., 1st Sess. 1199 (1864) (Rep. Wilson), as well as the South's suppression of African-based slave religions and persecution of church-based abolitionist movements were frequently discussed by supporters of the Fourteenth Amendment.[21] The Schurz

[21] See, *e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson) (noting the South's "bitter, cruel, relentless persecutions of the Methodists"); *id.* at 2979 (1864) (Rep. Farnsworth) ("[T]he slave power got the control of the Government, of the executive, legislative, and judicial departments. Then it was that they got possession of the high places of society. They took possession of the churches."); Cong. Globe, 38th Cong., 2d Sess. 138 (1865) (Rep. Ashley) (the South "has silenced every free pulpit within its control, and debauched thousands which ought to have been independent"); Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull) (decrying law that criminalized "exercising the functions of a minister of the Gospel [by] free negroes") (citation omitted); Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871) (Rep. Bingham) ("[The States] restricted the rights of conscience, and he had no remedy. * * * Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these?"); *id.* at 310 (Rep. Maynard) (rights secured by the Fourteenth Amendment include freedom of religion); Cong. Globe, 42d Cong., 1st Sess. 428 (1871) (Rep. Beatty) (citing the "sworn testimony of ministers of the Gospel who have been scourged because of their political opinions"); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994).

Report, which Congress ordered to document conditions in the former confederate states after the war, noted a number of instances of religious persecution, including some through the use of facially neutral laws. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 81 (1865) (Southerners have invoked noise regulations to "suppress the religious meetings among the colored people"); *id.* at 100 ("[T]here is such a general expression of contempt for negro religion, and such a desire to suppress it, if possible, that it seems as if the whites thought it a piece of terrible impertinence for the blacks to worship the same God that we do.").[22] In the face of such abuses, the notion that the Framers of the Fourteenth Amendment intended to decamp on the subject of religious freedom, putting all their trust in the State governments' discretionary protection and accommodation of religious exercise, particularly of non-"traditional[]" faiths (Pet. App. B5), is unsustainable.[23]

[22] See also S. Exec. Doc. No. 2, *supra*, at 85 (regulations proposed authorizing only ordained ministers to preach and imposing a 10:00 p.m. curfew on meetings in order to suppress worship services of freed slaves); *id.* at 26 (citing instances of burning of "churches in which colored people assembled to worship," threats of assassination against "colored preachers," and murders of Northern preachers); *id.* at 69 ("[O]ne man was taken out of bed and killed because * * * he was a preacher."); *id.* at 72 ("[T]heir humble worship of God is construed as a designing plot to rise against the citizens who oppress them."); *id.* at 82 (freed slaves need "the free exercise of their right to worship God"); *id.* at 93 (zoning Negro churches out of town and requiring special permits for Negro preachers); *id.* at 94 (limiting Negroes to attendance at services conducted by white ministers).

[23] See S. Exec. Doc. No. 2, *supra*, at 25-26 (warning that, if federal "protection be withdrawn" and "the State authorities in full power," there cannot be even "the smallest expectation that * * * a northern citizen would be protected in the exercise of his constitutional right to teach and preach to the colored people," and, instead, "[we] shall look for a renewal of the fearful scenes in which northerners were whipped, tarred and feathered, warned off, and murdered, before the war") ; John P. Stevens,

The respondents' argument that Congress's legislative authority to protect and accommodate the free exercise of religion is less than the States' also ignores this Court's holding in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). In *Boerne*, the Court specifically held that Congress's "broad" power under Section 5 of the Fourteenth Amendment to enact prophylactic legislation enforcing the rights protected by Section 1 of the Amendment includes "enforcing the constitutional right to the free exercise of religion." *Id.* at 518-519. Section 5 thus specifically empowers Congress to "intrude[] into 'legislative spheres of autonomy previously reserved to the States,'" and to "prohibit[] conduct which is not itself unconstitutional." *Id.* at 518. Furthermore, the central mechanism for enforcing the free exercise of religion prophylactically or remedially is to require more protection than the Free Exercise Clause itself compels—to step legislatively into that "play in the joints" between the Free Exercise and Establishment Clauses. *Boerne* is thus an explicit recognition by this Court that Congress has the power—consistent with the Establishment Clause—to enact legislation that enforces the free exercise of religion and that influences or regulates the policy choices that States make about accommodating religious exercise. What the Establishment Clause permits under Section 5 of the Fourteenth Amendment, it also permits under the spending power and Commerce Clause.

The Bill of Rights: A Century of Progress, 59 U. Chi. L. Rev. 13, 20 (1992) ("[T]he Liberty Clause[] in the Fourteenth Amendment has transformed the Bill of Rights from a mere constraint on federal power into a source of federal authority to constrain state power.").

II. THE INSTITUTIONALIZED PERSONS PROVISION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IS A PROPER EXERCISE OF THE SPENDING POWER

The Constitution vests Congress with the authority to appropriate federal monies to promote the general welfare. U.S. Const. Art. I, § 8, Cl. 1. Congress also has corresponding authority under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, to protect against diversion of that money to purposes that Congress deems inconsistent with the public welfare. See *Sabri* v. *United States*, 124 S. Ct. 1941, 1946 (2004). To that end, "Congress may attach conditions on the receipt of federal funds," *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987), and "may fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). "The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place." *Sabri*, 124 S. Ct. at 1947.

"Money is fungible," and there is little doubt that "a federal grant * * * pouring in" one part of an agency program may loosen up funds for use in other parts of that program. *Sabri*, 124 S. Ct. at 1946. For those reasons, conditions attached to federal funding may be imposed on the complete program or project for which federal funds are disbursed and compliance can be required in all programmatic operations, without tracing federal funds to the particular transaction in dispute. *Ibid.* In addition, the spending power is "not limited by the direct grants of legislative power found in the Constitution," and even "objectives not thought to be within Article I's 'enumerated legislative fields,' * * * may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Dole*, 483 U.S. at 207 (quoting

United States v. *Butler*, 297 U.S. 1, 66 (1936)). Accordingly, "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

RLUIPA is a valid exercise of Congress's spending power because (i) its guarantee of even-handed protection for religion promotes the general welfare; (ii) RLUIPA puts funding recipients on clear notice of their obligations; (iii) and the condition imposed is reasonably related to the purposes for which the federal funds are expended. See *Dole*, 483 U.S. at 207-208.

A. RLUIPA Promotes The General Welfare

The respondents have not seriously contested that RLUIPA promotes the general welfare. Pet. App. B10. Nor could they. RLUIPA's funding conditions promote the general welfare by ensuring that federal money is not used to discriminate against faith groups or individuals or to impose unjustified and substantial burdens on religious exercise. Like the prohibitions on the use of federal funds in programs that discriminate on the basis of race, 42 U.S.C. 2000d, gender, 20 U.S.C. 1681(a), disability, 29 U.S.C. 794, and age, 42 U.S.C. 6102, RLUIPA insulates an important civil right against erosion, enhances equality, and ensures that substantial burdens are not imposed on religious exercise "by simple want of careful, rational reflection or from some instinctive mechanism to guard against people" whose religious exercises "appear to be different" and out of the mainstream." *Board of Trustees* v. *Garrett*, 531 U.S. 356, 374-375 (2001) (Kennedy, J., concurring). Indeed, this Court recognized in *Smith* that legislation like RLUIPA would promote constitutional values:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. Because "the concept of welfare or the opposite is shaped by Congress," Congress's judgment that RLUIPA promotes the general welfare merits substantial deference. *Helvering* v. *Davis*, 301 U.S. 619, 645 (1937); see *id.* at 640.[24]

B. RLUIPA Provides Unambiguous Notice Of Its Funding Condition

RLUIPA, on its face, provides States with unambiguous notice that the receipt of federal funds will require them to justify burdens on religion under RLUIPA's statutory standard. RLUIPA spells out the legal standards to govern the States' conduct, 42 U.S.C. 2000cc-1(a), and announces that those terms will govern any "program or activity that receives Federal financial assistance," 42 U.S.C. 2000cc-1(b)(1). Like Title VI, which bars discrimination on the basis of race, color, or national origin in "any program or activity receiving Federal financial assistance," 42 U.S.C. 2000d, Title IX of the Education Amendments of 1972, which bars discrimination on the basis of sex in any "educational program or activity receiving Federal financial assistance," 20 U.S.C. 1681(a), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C.

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[24] That deference is so great that, in *Dole*, the Court questioned "whether 'general welfare' is a judicially enforceable restriction at all." 483 U.S. at 207 n.2 (citing *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976)).

794, which prohibits discrimination on the basis of disability in "any program or activity receiving Federal financial assistance," 29 U.S.C. 794(a), RLUIPA provides unmistakable notice to the States of the "consequences of their participation" in receiving federal funds. *Dole*, 483 U.S. at 207.

The respondents have objected (Pet. App. B10) that RLUIPA's compelling interest test is too vague to allow States to comprehend the consequences of accepting funds. That argument is wrong for two reasons. First, the Constitution requires only that States be provided clear notice of the existence of a legal obligation and a legal standard governing their conduct. It does not require that "every improper expenditure" under the statute be "specifically identified and proscribed in advance." *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985); see *id.* at 669. For example, Title IX's ban on gender discrimination, 20 U.S.C. 1681(a), is valid even though its broad prohibition has been interpreted to proscribe conduct, such as student-on-student sexual harassment, that requires case-by-case, contextual, and fact-intensive inquiries to determine whether a violation occurred. See *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999) (level of actionable harassment turns upon "a constellation of surrounding circumstances, expectations, and relationships"); see also *Lau* v. *Nichols*, 414 U.S. 563 (1974) (Title VI's ban on racial discrimination, 42 U.S.C. 2000d-1, is valid spending legislation as applied to prohibit conduct with a racially disparate impact, and includes an obligation to adhere to Executive Branch regulations). Application of the Rehabilitation Act's mandate of accommodation for individuals with disabilities likewise requires case-by-case consideration. It is sufficient, for constitutional purposes, that each of those laws, like RLUIPA, announces the governing legal standard in clear

terms; Congress need not precisely script case-specific litigation outcomes in advance.

Second, the respondents' objection that RLUIPA's terms are unconstitutionally vague cannot withstand scrutiny. RLUIPA's statutory standard is borrowed from the constitutional standard that courts routinely applied to free exercise claims prior to this Court's clarification of the constitutional test in *Smith*, and that same standard continues to govern the conduct of numerous States as a matter of state law. See note 6, *supra*. In addition, that same standard continues to govern Ohio as a matter of federal constitutional law with respect to (i) any hybrid free exercise claims that (like petitioners' claim for access to literature) also implicate other constitutional rights, (ii) any laws that intentionally target religion, and (iii) any free exercise claims) that arise within governmental schemes providing for individualized consideration of private interests. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993); *Smith*, 494 U.S. at 881-885. RLUIPA thus employs a familiar standard that "has been used in Constitutional jurisprudence for at least the last 100 years." Pet. App. B12; see *Procunier* v. *Martinez*, 416 U.S. 396 (1974), overruled in part by, *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989).

In short, Ohio received federal funds knowing full well what the compelling interest standard means and with full knowledge that the standard would govern its religious accommodation decisions in state institutions. If Ohio is uncomfortable with operating under that legal test, its proper recourse is to forgo federal funding, not to take the money and then complain when it must keep its promises.[25]

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[25] The respondents' reliance on *Pennhurst*, *supra*, is misplaced. The problem in that case was that the language sought to be enforced against the State, which suggested that a State's treatment of persons with developmental disabilities should be the "least restrictive" of the person's

C. RLUIPA's Spending Condition Is Reasonably Related To The Purposes For Which State Prisons Receive Federal Funds

Like the prohibitions on racial and gender discrimination with respect to federal spending on which RLUIPA was modeled, H.R. Rep. No. 219, *supra*, at 14, RLUIPA directly advances the federal government's interest in ensuring that federally funded institutional programs do not impose unjustified burdens on religious exercise or discriminate in the accommodation process. Central to the spending power is the authority to "requir[e] that public funds, to which all taxpayers * * * contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in * * * discrimination." *Lau*, 414 U.S. at 569 (citation omitted). Just as other Spending Clause statutes prohibit discrimination on the basis of race, sex, age, and disability in federally funded programs, RLUIPA protects against the risk that federal funding may subsidize discrimination on the basis of religion or erode religious freedom by imposing reasonable conditions directly related to vindicating that purpose. "Whatever may be the limits" of Congress's spending authority, "they have not been reached" where Congress simply requires that the recipients of federal funds conduct the funded programs in a manner that is consonant with congressional attention to constitutional freedoms, even if the federal conditions are more protective than the Constitution itself. See *Lau*, 414 U.S. at 569 (Title VI disparate impact regulation falls within Spending Clause power as a means of avoiding the risk of federal involvement in racially discriminatory policies); see *Dole*, 483 U.S. at 206 (Congress "has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal

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personal liberty, 451 U.S. at 13 (quoting 42 U.S.C. 6010), was purely precatory, 451 U.S. at 12-13, 19, 23. RLUIPA's direct and mandatory language cannot plausibly be read as merely hortatory.

moneys upon compliance by the recipient with federal statutory and administrative directives"; citing *Lau*) (internal quotation marks omitted). RLUIPA's institutionalized persons provision thus "follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is designed to guard against unfair bias and infringement on fundamental freedoms." *Charles*, 348 F.3d at 607 (internal quotation marks omitted).

That is particularly true here, where the limitations on federal *funds* parallel the restrictions on federal *programs* under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb. Furthermore, the relationship between federal funds designated for the operations of institutional facilities and RLUIPA's protection of inmates' well-being is direct and targeted. Some of the funds received by Ohio "deal specifically with inmate rehabilitation," Pet. App. B13, and thus directly implicate RLUIPA's mandate for the even-handed and scrutinized accommodation of inmate religious practices during their rehabilitation. See *id.* at B7 (some federal funds are for "prisoner education, vocational training and assistance, and drug treatment"). Other funds are targeted for "operational efforts," while still others fund prisoner meals—an area of frequent request for religious accommodation. *Ibid.*; see *Madison*, *supra* (request for kosher diet denied).

The nexus between those activities and RLUIPA's mandate is close, far surpassing the linkage this Court found to be constitutionally sufficient in upholding the Hatch Act's broad restriction on the political activities of state employees. See *Oklahoma* v. *Civil Serv. Comm'n*, 330 U.S. 127 (1947) (across-the-board requirement that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take any "active part in political management") (quoting 18 U.S.C. 611). Moreover, the federal funds that

Ohio receives under the State Criminal Alien Assistance Program, Pet. App. B7, are unrestricted and may be used for *any* activity or purpose the recipient chooses, see 8 U.S.C. 1231(i); 42 U.S.C. 13710, which underscores the fungibility of federal funding in the institutional context and thus the justification for RLUIPA's program-wide coverage. Cf. *Sabri*, 124 S. Ct. at 1946 (noting the fungibility of federal funding). In short, the Constitution requires only a reasonable fit between RLUIPA's standard and the purpose of federal funding—not a perfect fit in every isolated application of the law—and that standard is amply satisfied here.

III. WHEN THE COMMERCE CLAUSE JURISDICTIONAL ELEMENT IS TRIGGERED, THE INSTITUTIONALIZED PERSONS PROVISION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IS A PROPER EXERCISE OF THE COMMERCE CLAUSE POWER

In addition to requiring compliance with RLUIPA's standard by recipients of federal funds, Congress directed that RLUIPA's institutionalized persons provision would apply in individual cases where imposition or removal of the substantial burden on religion "would affect commerce with foreign nations, among the several States, or with Indian tribes," 42 U.S.C. 2000cc-1(b)(2), unless that affect on commerce, in the aggregate, would not be substantial, 42 U.S.C. 2000cc-1(g). No finding has been made that the Commerce Clause authority is implicated in this case. Quite the opposite, the district court refused to address the issue because of unresolved factual and legal questions about "the relationship between the internal operation of state prisons and interstate commerce." Pet. App. B9. The court of appeals did not address the Commerce Clause question either. *Id.* at A8. It thus would be premature for this Court to address the constitutionality of RLUIPA's Commerce Clause applications "in advance of the necessity of deciding

it." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); see, *e.g.*, *Ashcroft* v. *Oakland Cannabis Buyers Cooperative*, 532 U.S. 483, 495 n.7 (2001) (declining to reach Commerce Clause issue that was not addressed by the court of appeals).[26]

In any event, the Commerce Clause provision is facially constitutional. Congress has the power to regulate both interstate and intrastate activities that have a substantial effect on commerce. *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995). By making proof of precisely that connection to commerce an indispensable jurisdictional element in each case where the Commerce Clause authority is invoked, Congress ensured that RLUIPA will only apply in those cases where the constitutionally required nexus to commerce is both present and concrete. RLUIPA's language also evidences Congress's intent to exercise "the fullest jurisdictional breadth" that is "constitutionally permissible under the Commerce Clause,"—no more, but also no less. *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam); accord *Jones* v. *United States*, 529 U.S. 848, 854 (2000).

Triggering federal regulatory obligations upon satisfaction of such a jurisdictional element is a constitutionally permissible exercise of Congress's Commerce Clause power. Indeed, RLUIPA's provision parallels the commerce element in the Hobbs Act, 18 U.S.C. 1951(a), which this Court upheld as proper Commerce Clause legislation in *United States* v. *Green*, 350 U.S. 415, 420-421 (1956).[27]

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[26] Nor is there any conflict in the circuits on the question. In fact, the Commerce Clause provision is rarely invoked because the vast majority of RLUIPA's institutionalized person cases arise in state prisons, all of which receive federal funding. See note 16, *supra*.

[27] See also *United States* v. *Morrison*, 529 U.S. 598, 612 (2000) (inclusion of a jurisdictional element "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce"); *Lopez*, 514

Congress's reliance on its Commerce Clause power, moreover, reflects the reasonable judgment that, just as in free society, governmental regulation of inmates' diets, clothing, literature, and other property can have a substantial effect on interstate commerce. See, *e.g.*, *Joint Stmn.*, 146 Cong. Rec. at S7775 (burdens that "prevent[] a specific economic transaction in commerce, such as * * * an interstate shipment of religious goods" can have, in the aggregate, a substantial effect on commerce); *Charles*, 348 F.3d at 605 ("Inmates purchase religious and other personal property with personal funds."). Indeed, many prison systems, including Ohio's, operate prison industries that pay inmates wages, employ materials from other States, and produce goods for sale in the marketplace, generating tens of millions of dollars in annual revenue.[28] In Congress's experienced judgment, "[t]he aggregate of all such transactions is obviously substantial, and this is confirmed by data presented to the House Subcommittee on the Constitution." *Joint Stmn.*, 146 Cong. Rec. at S7775.

U.S. at 561 (jurisdictional element "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

[28] See Pet. App. B7 (Ohio Prison Industries use raw materials produced in other States to manufacture shoes, beds, furniture, and mulch, for sale in Ohio and other States); *OPI Corr. Indus.* (visited Dec. 15, 2004) <http://www.opi.state.oh.us/about_OPI/about.OPI.asp> (Ohio Penal Industries had $30 million in sales in FY2002); cf. *United States* v. *Darby*, 312 U.S. 100, 115-116 (1941) (Congress may proscribe the use of interstate commerce to market goods produced under labor conditions that are adverse to federal policy); *Kentucky Whip & Collar Co.* v. *Illinois Cent. R.R.*, 299 U.S. 334, 343-352 (1937) (Commerce Clause power extends to the regulation of prison labor); see generally *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (commerce power extends to legislation "to foster, protect, control and restrain").

IV. THE INSTITUTIONALIZED PERSONS PROVISION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT COMPORTS WITH THE TENTH AND ELEVENTH AMENDMENTS

A. The Tenth Amendment

RLUIPA is wholly consistent with the Tenth Amendment. That is because the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *New York* v. *United States*, 505 U.S. 144, 156 (1992) (quoting *United States* v. *Darby*, 312 U.S. 100, 124 (1941)). Because RLUIPA is a valid exercise of Congress's spending and Commerce Clause power, Congress's exercise of its constitutionally assigned powers cannot run afoul of the Tenth Amendment. Moreover, because RLUIPA's application to the respondents reflects an exercise of Congress's spending authority, their Tenth Amendment argument is foreclosed by *Dole*. There is "no violation of the State's sovereignty because the State could * * * adopt the simple expedient of not yielding" to the offer of funding. 483 U.S. at 210 (quoting *Oklahoma*, 330 U.S. at 143); see *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983) ("Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty."); *Oklahoma*, 330 U.S. at 143-144 (regulation of political activities of public employees under spending authority poses no Tenth Amendment problem).

Nor would application of RLUIPA to this case through the Commerce Clause power implicate the Tenth Amendment. RLUIPA simply requires the State, when its conduct has a substantial effect on interstate commerce, "to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them." *EEOC* v. *Wyoming*, 460 U.S.

226, 239 (1983). Indeed, the fact that "a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988); see *Reno* v. *Condon*, 528 U.S. 141 (2000). RLUIPA, moreover, is a calibrated limitation on state action. It imposes no flat prohibitions or blanket rules. Rather, Congress simply legislated a statutory standard with which courts and States are already familiar, and which balances States' interests against the individual's religious liberty. See *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment) (compelling interest test "strike[s] sensible balances between religious liberty and competing state interests").

Furthermore, RLUIPA does not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 176 (citation omitted). RLUIPA simply requires that whatever prison operations the State chooses to undertake be accomplished consistent with federal norms when they implicate federal funds or interstate commerce, just as States currently must conduct their prison systems within the constraints of Title VII, 42 U.S.C. 2000e, Title VI, 42 U.S.C. 2000d, Title IX, 20 U.S.C. 1681(a), the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*

B. The Eleventh Amendment

The respondents' Eleventh Amendment argument fares no better. First, petitioners filed suit only against state officers in their official capacity, and not against the State or any state agencies. Their claims for prospective declaratory and injunctive relief thus fall squarely within *Ex parte*

Young, 209 U.S. 123 (1908). See also *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002).[29]

Second, by accepting federal funds conditioned on compliance with RLUIPA's terms, including its provision for private enforcement, the State waived its Eleventh Amendment immunity. See *Florida Prepaid*, 527 U.S. at 686-687.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[29] Petitioners' claim for money damages poses an antecedent question of statutory construction concerning whether RLUIPA's authorization of "appropriate relief" encompasses monetary damages. Cf. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992). That predicate question, which was not addressed below and which is not embraced within the question presented, must be resolved before the Court could address the Eleventh Amendment question. See *Garrett*, 531 U.S. at 360 n.1.

APPENDIX A

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Article I, Section 8, Clause 1 of the United States Constitution provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

3. Article I, Section 8, Clause 3 of the United States Constitution provides:

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

4. Article I, Section 8, Clause 18 of the United States Constitution provides:

The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution for the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

APPENDIX B

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. § 2000cc through 2000cc-5, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Land Use and Institutionalized Persons Act of 2000".

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS.—

(1) GENERAL RULE.—No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION.—This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION.—

(1) EQUAL TERMS.—No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION.—No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS.—No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE.—No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of

general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION.—This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION.—A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION.—If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT.—Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended—

(1) by inserting "the Religious Land Use and Institutionalized Persons Act of 2000," after "Religious Freedom Restoration Act of 1993,"; and

(2) by striking the comma that follows a comma.

(e) PRISONERS.—Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT.—The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION.—If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED.—Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED.—Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED.—Nothing in this Act shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE.—A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or

practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW.—With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION.—This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL.—Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY.—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establish-

ment Clause, shall not constitute a violation of this Act. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS.—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended—

(1) in paragraph (1), by striking "a State, or a subdivision of a State" and inserting "or of a covered entity";

(2) in paragraph (2), by striking "term" and all that follows through "includes" and inserting "term "covered entity" means"; and

(3) in paragraph (4), by striking all after "means" and inserting "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.".

(b) CONFORMING AMENDMENT.—Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking "and State".

SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT.—The term "claimant" means a person raising a claim or defense under this Act.

(2) DEMONSTRATES.—The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE.—The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT.—The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION.—The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY.—The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE.—

(A) IN GENERAL.—The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE.—The use, building, or conversion of real property for the purpose of religious exercise shall be con-

sidered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.